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In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 158.

BROTHERHOOD OF RAILROAD TRAINMEN, *et al.*,

Petitioners,

vs.

JOHN P. O'CONNELL, *et al.*,

Respondents.

and

No. 172.

ELMER L. DIRKS, *et al.*,

Petitioners,

vs.

W. L. BIRKHOLZ, *et al.*,

Respondents.

BRIEF OF AMICUS CURIAE BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN.

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TABLE OF CONTENTS.

Interest of Amici Curiae ---------- 1

Argument ---------- 3

1. The statute is unambiguous; it is therefore inappropriate to consult legislative history ---- 4
2. The legislative history supports respondents -- 6
3. The *Rychlik* and *Rohrer* cases do not help petitioners ---------- 8
4. Contemporaneous construction of the statute and past practice in the industry favor respondents ---------- 9

Conclusion ---------- 10

TABLE OF AUTHORITIES.

Cases.

Brotherhood of Locomotive Engineers v. Chicago, Milwaukee, St. Paul and Pacific R. Co., 41 F. Supp. 751 (E.D. Wisconsin 1941) ---------- 2

Carter v. Richmond F. & P. RR. Co. (D.C. Va. 1968) ----F. Supp. ---- ---------- 3

Collett, Ex parte, 337 U.S. 55, 93 L. ed. 207 (1949) -- 4, 5

General Committee, BLE v. Missouri-K-T R.R. Co., 320 U.S. 323 (1943) ---------- 2

Hoosier v. Baltimore and Ohio R. Co., 177 F. Supp. 186 (S.D. Indiana, 1959), affirmed, 274 F.2d 197 (7th Cir. 1960) ---------- 2

McElroy v. Terminal Railroad Association, 392 F.2d 966 (7th Cir. 1968) ---------- 5

Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294 (1933) ---------- 9

Pennsylvania R. Co. v. Rychlik, 352 U.S. 480 (1957) 8

Railway Employees Department v. Hanson, 351 U.S. 255 (1956) 8

Rohrer v. Conemaugh and Black Lick Rd. Co., 359 F.2d 127 (3rd Cir. 1966) 8

Statutes.

Judicial Code, Section 1404 (a) 5

Railway Labor Act, 45 USC § 151 *et seq.*:

Section 2, 45 USC § 152 1

Section 2, Eleventh (a), 45 USC § 152, Eleventh (a) 2

Section 2, Eleventh (c), 45 USC § 152, Eleventh (c) 3, 4, 7, 8, 9

Section 3, First (a), 45 USC § 153 First (a) 1

Other Authorities.

96 Congressional Record 15735 7

96 Congressional Record 16189 7

96 Congressional Record 16268 7

Hearings on S 3295, Senate Committee on Labor and Public Welfare, 81st Congress 6

Report 2262, 81st Congress 2d Session, Senate Committee on Labor and Public Welfare 7

S 3295, 81st Congress, 2d Session, approved as Public Law 914, 81st Congress 2d Session 6, 7

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INTEREST OF AMICUS CURIAE.

Amicus curiae, Brotherhood of Locomotive Firemen and Enginemen (BLF&E), is a voluntary labor organization having its headquarters in Cleveland, Ohio. It is a railway labor organization "national in scope" and "organized in accordance with" Section 2 of the Railway Labor Act ("RLA"), 45 USC § 152. (See Sec. 3 First (a) RLA, 45 USC § 153 First (a).)

BLF&E has an immediate interest in the subject matter of this litigation. It represents the great bulk of loco-

motive firemen on the nation's major carriers by railroad. In addition, it represents locomotive engineers on several major railroads.

Another voluntary labor organization, likewise "national in scope" and "organized in accordance with" RLA, the Brotherhood of Locomotive Engineers ("BLE"), represents primarily locomotive engineers on carriers by railroad and also represents some firemen. BLE has filed a brief amicus curiae in support of petitioners in each of the cases.

The issue arising between Switchmen's Union of North America (SUNA) and the Brotherhood of Railroad Trainmen (BRT) in the case at bar, arises between BLF&E and BLE. As this Court knows, there is intercraft mobility between firemen and engineers.

The interplay between the crafts of engineers and firemen, the promotion and demotion of engineers and firemen, their dual seniority rights, the ebb and flow or movement from the firemen's craft to the engineers' craft, have been the subject of numerous court decisions. See, for example, *General Committee, BLE v. Missouri-K-T-R.R. Co.*, 320 U.S. 323, 325-6; *Brotherhood of Locomotive Engineers v. Chicago, M., St. P. & P. R. Co.*, 41 F. Supp. 751 (E.D. Wis. 1941); and *Hooser v. Baltimore & Ohio R. Co.*, 177 F. Supp. 186, 194-6 (S.D. Ind. 1959), affirmed, 279 F. 2d 197, 198 (7th Cir. 1960).

On about 296 carriers by railroad of all classes, BLF&E represents the firemen, and BLE the engineers. On 153 carriers, BLF&E represents both firemen and engineers; on 48 carriers, BLE represents both firemen and engineers.

On some carriers, BLE has entered into union shop contracts pursuant to Sec. 2, Eleventh (a), Railway Labor Act, 45 U.S.C. Sec. 152, Eleventh (a). These contracts, on

one or two of the 48 carriers where BLE represents both firemen and engineers, require membership in BLE and no other organization despite the provisions of Sec. 2, Eleventh (c). (See BLE Brief in No. 172, p. 2.)

Litigation essentially similar to the cases at bar has resulted favorably to BLF&E, on the strength of the decision below. (*Carter v. Richmond, F. and P. RR.* (D.C. Va., No. 43987, ____ F. Supp. ____ (Sept. 12, 1968).) (This case is discussed in BLE Brief in No. 172, pp. 2-4.)

BLF&E has entered into union shop contracts on some of the 153 carriers on which it represents both firemen and engineers. The issue involved in this litigation does not arise in connection with BLF&E contracts, however, respecting firemen or engineers who belong to BLE, because BLF&E interprets Sec. 2, Eleventh (c) as permitting alternative membership in BLE to satisfy the union shop requirement.

ARGUMENT.

Sec. 2, Eleventh (c) provides that the requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a), which authorizes the union shop contract, is satisfied as to engine, train, yard, or hostling employees (i.e., operating employees) by membership in any labor organization, national in scope, which admits such employees to membership.

The yard switchmen who belong to respondent SUNA, meet the literal terms of this provision. But petitioners ask this Court to read into Sec. 2, Eleventh (c) a provision not found in the statute. The language they would read in is not wholly clear, but presumably it would permit an employee to join or remain a member of an alternative union provided only such union held a collective bargaining contract with the carrier with respect to

its craft. (Pet. Brief No. 172, p. 4; Pet. Brief No. 158, p. 6.)

Sec. 2, Eleventh (c) provides literally that the union shop membership requirement is satisfied if the employee holds or acquires membership in any one of the labor organizations national in scope. Petitioners would add another qualification.

Petitioners apparently argue that the provisions of Sec. 2, Eleventh (c) should not be read literally. They contend that Sec. 2, Eleventh (c) permits alternative membership when the alternate labor organization is not only national in scope, organized in accordance with the Railway Labor Act, and admits to membership employees in the crafts or classes within the jurisdiction of the First Division of the Adjustment Board (the stated requirements of Sec. 2, Eleventh (c)), but in addition, only when such alternate labor organization is also a duly authorized and designated representative of employees of the carrier involved (a qualification nowhere to be found or even hinted at in Sec. 2, Eleventh (c)).

There are compelling reasons why this Court should decline to so rewrite the statute.

1. The statute is unambiguous; it is therefore inappropriate to consult legislative history.

Petitioners in No. 172 (Pet. Brief pp. 21-33) rely heavily on legislative history.

Research into legislative history is a necessary and valuable adjunct to the interpretative process. But it is a well accepted canon of construction that legislative history is relevant only under circumstances where the statute presents an ambiguity. When the statute is plain, there is no need—indeed, it is inappropriate—to resort to legislative history. *Ex parte Collett*, 337 U.S. 55, is in point.

There the question was whether an action under the Federal Employers' Liability Act was subject to transfer for the convenience of parties and witnesses. Under the literal wording of Sec. 1404 (a) of the Judicial Code, such an action could be transferred, and this Court upheld transfer. It declined to look to legislative history said to carve out an exception from Sec. 1404 (a) for FELA cases, saying:

> "The short answer is that there is no need to refer to the legislative history where the statutory language is clear. The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction. *Gemsco, Inc. v. Walling,* 324 U. S. 244, 260. This canon of construction has received consistent adherence in our decisions."

The warning sounded in *Collett* has special relevance here. The Railway Labor Act, while short, is complex legislation, reflecting generations of development of special customs and practices in the railroad industry unlike those prevailing elsewhere. Alternative unions have a place in the railroad industry not accorded them in industry generally. We cite but one example because it is fresh: the Court of Appeals for the Seventh Circuit has held recently that a fireman, a member of BLF&E, in negotiating a grievance arising out of work as an engineer, under a carrier-BLE contract, may be represented by BLF&E. This, despite a provision in the BLE agreement barring such representation. (*McElroy v. Terminal Railroad Association,* 392 F. 2nd 966). (Cert. pending, October Term, 1968, No. 81, filed May 10, 1968). (See BLE Brief No. 172, p. 5).

2. The legislative history supports respondents.

If, however, we do look to legislative history we see that petitioners have misread it. Sec. 2, Eleventh, became an amendment to the Railway Labor Act by enactment of Public Law 914, 81st Congress (S. 3295) approved Jan. 10, 1951. From its inception, S. 3295 recognized the special problem of the operating employees with respect to the union shop. The bill, as originally introduced, dealt with the union shop in cryptic fashion. It authorized the union shop, and provided additionally that an employee could not be discharged "because of membership in any other organization." (The bill in its initial form appears in Hearings on S. 3295, Senate Committee on Labor and Public Welfare, 81st Congress, p. 2.)

At the hearings conducted by the Senate Committee on Labor and Public Welfare, Harry See, a representative of the Brotherhood of Railroad Trainmen, petitioner here in both cases, in May, 1950, suggested to the Senate Committee far more elaborate language. The BRT proposal was that the union shop requirement contain this exception:

> "provided that when two or more crafts or classes closely related as respects the work performed by each and employment rights in more than one of them are held by the same employee, or promotions from one of such crafts or classes to another are had, the requirement for membership shall be satisfied by membership in the organization of the employee's choice, *which is the duly designated or recognized craft or class representative of any one of them.*" (Emphasis added.) [1]

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[1] Hearings before a Subcommittee of the Committee on Labor and Public Welfare, United States Senate, 81st Cong., 2nd Sess. on S. 3295, p. 69.

There can be little question that the BRT May, 1950, proposal made to the Senate Committee would have permitted the collective bargaining representative to bar an employee from satisfying the union shop requirements by acquiring membership in an alternative union unless the alternative union was also a duly authorized and designated representative of employees of the carrier involved.

The BRT proposal was not adopted. S. 3295 as it emerged from the Committee contained no provision regarding the operating unions separately. (Rept. 2262, 81st Congr. 2nd Sess. August 9, 1950 Senate Committee on Labor and Public Welfare p. 1.) When the bill reached the floor of the Senate, on September 23, 1950, the Committee offered an amendment to restore essentially the original proviso. (96 Congr. Rec. 15735.) But the BLE objected.

When the bill reached passage stage on December 6 the matter still was unresolved. Senator Lucas of Illinois asked for a recess, 96 Congr. Rec. 16189. That very day, December 6, BRT, BLF&E, and Order of Railway Conductors transmitted the text of Section 2, Eleventh (c) as it became law. They urged adoption of S. 3295 with the modification suggested. The Senate, the next day, December 7, adopted the proposed language. (96 Congr. Rec. 16268.)

The conclusion is inescapable that BRT was fully aware of the problem at bar; that it proposed language to authorize the agreements now at bar; that such language never found its way into a committee proposal or an amendment on the floor of Congress; that BRT and the other organizations seven months later proposed language to Congress varying critically from the initial proposal and that Congress adopted it. We do not know what prompted BRT and the other organizations to recommended language to Congress varying from the May, 1950,

BRT proposal. What we do know is that the proposal transmitted to Congress on December 6 did not contain the restrictive limitation initially proposed by BRT.[1]

BRT seeks to obtain by litigation what it had ceased even to ask for from Congress.[2]

3. The Rychlik and Rohrer cases do not help petitioners.

Petitioners (Pet. Brief No. 172, pp. 14-19; No. 158, p. 6) rely heavily on *Pennsylvania R. Company v. Rychlik*, 325 U. S. 480, wherein this Court considered the meaning of the phrase in Sec. 2, Eleventh (c)—"labor organizations, national in scope, organized in accordance with this Act." Membership in such organizations is permitted as an alternative to joining the union holding the contract. In *Rychlik*, this Court held that the phrase refers only to unions represented on the National Railroad Adjustment Board. A union even if "national in scope" is not "organized in accordance with" the Act, if it lacks such representation. No other issue was decided.[3]

Rohrer v. Conemaugh and Black Lick Railroad Company, 359 F. 2d 127 (3rd Cir. 1966), like *Rychlik*, is cited

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[1] BLE Brief No. 172 p. 21 et seq. refers to the BRT proposal but does not quote the text actually suggested. Thus the crucial point of the above analysis is not apparent.

[2] The issue before this Court affects primarily the operating employees and their brotherhoods. Congress wished to let them solve their own problems in their own way. What this Court once said of the RLA is surely true of the 1951 RLA amendments:

> "It is accurate to say that the railroads and the railroad unions between them wrote the Railway Labor Act of 1926 and Congress formally enacted their agreement." *Railway Employees Department v. Hanson*, 351 U.S. 225, 240 (concurring opinion of Mr. Justice Frankfurter).

[3] This Court did consider the legislative history of the 1951 amendment, but did not discuss the critical BRT proposal, and its subsequent rejection.

by both petitioners (Pet. Brief No. 172, p. 19; No. 158, p. 6). *Rohrer* holds only that a union may enter into a valid union shop agreement under Sec. 2, Eleventh (a) although not "national in scope" and not "organized under" the Railway Labor Act. (The union was the Steelworkers). The exceptions of Sec. 2, Eleventh (c) were not before the Court. *Rohrer* accordingly does not advance petitioners' cause.

4. Contemporaneous construction of the statute and past practice in the industry favor respondents.

From 1951, when the union shop provision was first enacted, until about 1967, it was the uniform practice of the operating brotherhoods to frame their union shop clauses couched in the language of Sec. 2, Eleventh (c). This fact constitutes persuasive evidence that Sec. 2, Eleventh (c), when first enacted and for many years thereafter was interpreted by all of the operating brotherhoods, including petitioners, to mean what respondents say it means. Not until about 1967, for the first time, did BRT apparently attempt to read into it the meaning it now claims. It is an established principle of law that a court will not reject "a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." This language from *Norwegian Nitrogen Products Co. v. United States,* 288 U.S. 294, was applied to an administrative agency. But it has, we think, equal force here where the men "charged with the responsibility" are the brotherhoods to whom the statute was a grant of authority coupled with a restriction on the grant. Their contemporaneous and continuing interpretation of the restriction should be given weight. This consideration

has special weight, where, as here, petitioners seek to read into the restriction words which are not there.

CONCLUSION.

The judgments below are supported by the clear language of the statute; it is therefore inappropriate to consult legislative history; if such history is consulted it does not aid petitioners. Contemporaneous construction of the statute and continued practice both are opposed to the position of petitioners.

The judgments should be affirmed.

Respectfully submitted,

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